passed upon and settled at such settlement. In charging the jury, the court shall give to them all matters of law which it thinks necessary for its information in rendering a verdict.

6. When the jury has been charged, unless the case is submitted to the jury, on either side, or on both sides, without argument, the plaintiff must commence and may conclude the argument. If several defendants, having several defenses, appear by different counsel, the court must determine their relative order in the evidence and argument. Counsel, in arguing the case to the jury, may argue and comment upon the law of the case, as given in the instructions of the court, as well as upon the evidence of the case.

Section 2. That an act approved February 15th, 1901, entitled, "An Act to Amend Section 2070 of the Penal Code of Montana, relating to the method of Procedure in the trials of Criminal Actions," and all acts and parts of acts in conflict herewith be and the same are hereby repealed.

Section 3. This Act shall take effect and be in force from and after its passage and approval by the Governor.

Approved March 4th, 1907.

For Relief to Persons Erroneously Convicted.—The following is the bill referred to in Dean Wigmore's editorial in the present issue. Together with the editorial and Mr. Borchard's article in this number of the JOURNAL it has been reprinted in Senate Document 974, 62d Congress, 3rd Session, and may be obtained from Senator Sutherland or any other member of Congress. The bill was introduced in the House on December 5 by Mr. Evans and in the Senate on December 10 by Senator Sutherland. H. R., 26748; S. 7675.

To grant relief to persons erroneously convicted in courts of the United States.—Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

§ 1. That any person who having been convicted for any crime or offense against the United States, shall hereafter, on appeal from the judgment of conviction or on the retrial or rehearing of his case, be found to have been innocent of the crime with which he was charged and not guilty of any other offense against the United States, or who, after inquiry by the Executive has received a pardon on the ground of innocence, may, under the conditions hereinafter mentioned, apply by petition for indemnification for the pecuniary injury he has sustained through his erroneous conviction and imprisonment.

The bill is limited to convictions in the federal courts—that is, crimes or offenses against the United States. It is limited to those only who have been *convicted and imprisoned* under a judgment of conviction, and whose innocence is subsequently established. The right to the relief is discretionary only. It is called here indemnification, although some other word may be substituted. The relief is limited to the *pecuniary* injury, thus excluding all compensation for *moral* injury, which, in case of conviction for crime, is generally the more serious element of injury. This limitation follows, in general, the European statutes and has as its object the restriction to its narrowest limits (while acknowledging the principle) of a demand on the State Treasury. When the innocence is established after the wrongful conviction *plus* imprisonment, the indemnity should cover the injury during the whole period of detention, both before and after trial. The expression "of the crime which he was charged *or of any other offense against the United States*" has been used to cover cases where the indictment may fail on the original count, but claimant may yet be guilty of another or a minor offense. Therefore, if the accused has committed *any* offense

against the United States, his right to relief is barred. Some may raise the objection that the right to petition the United States is granted in the bill, even though the accused may have a private right of action against an individual for false imprisonment or malicious prosecution. I do not consider it desirable to insert this limitation in the bill, though if there is a general feeling that the accused must exhaust all his other remedies, either as a bar to this relief or as a condition precedent to demanding it, words to this effect will have to be inserted. My own feeling is that the court of claims should take into consideration, under section 9, all matters connected with the case, including the other remedies of the accused, whether he has a possible right of action against third persons, how much that right may have been worth, the possibility of securing and executing judgment, and particularly the extent of the *State's* participation in the wrong inflicted on the individual.

§ 2. That the claimant may, within six months after he has been finally acquitted or pardoned on the ground of innocence, petition the Court of Claims for the relief granted in this act.

A very short statute of limitations is fixed, following the European statutes in this respect. The claim is to be brought before the court of claims, which has been granted jurisdiction over similar awards made by the United States to individual claimants. (See, for example, the French Spoilations Act, 23 Stat. at L. 283).

§ 3. That the court is hereby authorized to make all needful rules and regulations consistent with the laws of the land for executing the provisions hereof.

This follows in general the provisions of section 2 of the French Spoilations Act, 23 Stat. at L. 283.

§ 4. That the claimant shall have the burden of proving his innocence, in that he must show that the act with which he was charged was not committed at all, or, if committed, was not committed by the accused.

The cases in which the relief can be claimed are limited here to those only in which the claimant shall affirmatively prove his innocence. Hence, only a most flagrant case of injustice could be brought within the terms of this section. In providing that the claimant must show that the crime was not committed at all, or if committed, was not committed by the accused, I am following in general the provisions of the law of Sweden and Hungary. It is likewise intended to limit the relief to cases in which the justice of an award is obvious.

§ 5. That the claimant must show that he has not, by his acts or failure to act, either intentionally or by wilful misconduct or negligence, contributed to bring about his arrest or conviction.

This carries out simply the equitable maxim that no one shall profit by his own wrong or come into court with unclean hands. It follows the provisions generally found in the European statutes, although these provide, for example, in the German act, that gross negligence must exist to bar the right. In the United States we are opposed to fixing degrees of negligence. (See 18 Harvard Law Review, 536-37).

§ 6. That the court of claims shall examine the validity and amount of all claims included within the description of this act; they shall receive all suitable testimony on oath or affirmation and all other proper evidence; and they shall report all such conclusions of fact and law as in their judgment may affect the right to relief.

In its general provisions this section follows section 3 of the French *Spoliations Act,* 23 Stat. at L. 283. Under it the court of claims would, of course, receive the record from the trial court, the appellate court, and the second trial court, in order to determine the justice of relief in the case. They may also call for oral or written testimony whenever desired. This section gives the court full power and opportunity to arrive at the facts.

§ 7. That upon proof satisfactory to the court of claims that the claimant is unable to advance the costs of court and of process, the cost of obtaining and

printing the record of the original proceedings and of securing the attendance of such witnesses as the chief justice or the presiding judge of the court of claims shall certify to be necessary, and the service of all notices required by this Act, shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the secretary of the treasury of a duly authenticated order, certified by the clerk of the court of claims and signed by the chief justice or, in his absence, by the presiding judge of said court.

The claimant will, in most cases, be a poor person and it is desirable that the expense of bringing up the record should not fall as a burden on him. This expense might, in fact, prevent the poor claimant from bringing suit at all. It should, therefore, be provided that in such cases where the Chief Justice, or the presiding judge of the court of claims, considers that the claimant has made out a *prima facie* case of erroneous conviction and his own innocence that the expense of bringing up the record shall be borne by the treasury. Where the claimant does not make out a *prima facie* case coming within the provisions of this Act, the chief justice of the court of claims would not make the certification necessary to have the treasury bear the expense.

§ 8. That the court shall cause notice of all petitions presented under this act to be served on the Attorney General of the United States, who shall be authorized, by himself or his assistant, to examine witnesses, to cause testimony to be taken under this Act, and to be heard by the court. He shall resist all claims presented under this Act by all proper legal defenses.

The purpose of this section is self-explanatory. In terminology it follows the provisions of section 4 of the French Spoliations Act, 23 Stat. at L. 284.

§ 9. That the court of claims in granting or refusing the relief demanded shall take into consideration all the circumstances of the case which may warrant or defeat or in any other way affect the right to and the amount of the relief herein provided for, but in no case shall the relief granted exceed five thousand dollars.

The granting of the relief is *discretionary,* as was stated in the beginning. Most of the European statutes generally present a list of conditions which shall bar or limit the right to the relief, but I consider it best to follow the French law which makes no mention of limiting conditions, but leaves the judge to determine from all the circumstances of the case whether any and how much relief is proper. The relief is limited to five thousand dollars. This provision is to limit any exorbitant claims which may be brought.

The court of claims is given jurisdiction over the matter in preference to the trial court, or the appellate court, or the second trial court (which presumably could judge better of the merits and circumstances of the case) in order to maintain the traditions of American judicial procedure. If the jury or trial court were given the right to pronounce on the propriety of an award in a case of acquittal (as is the case in some of the European countries) it would bring into our law a new kind of acquittal, in which the jury or judge could acquit *with degrees of approval or sympathy.* The distinction would be an odious one to make. While it would be desirable to have the benefit of the special knowledge of the case secured by the trial court, or the jury, still it is better to forego this advantage for the sake of conformity with legal custom and leave the establishment of the damage to a new court conforming in its jurisdiction in this case to its jurisdiction in similar cases of claims against the United States.

In all respects (a) as to the person indemnified; (b) as to what he must show; (c) as to the amount of the indemnity; and (d) as to the discretionary character of the relief, the indemnity has been limited to the most flagrant cases of unjust conviction and deserving relief.

§10. That in all cases of final judgments by the court of claims the sum due thereby shall be paid out of any general appropriation made by law for the pay-

ment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the court of claims, and signed by the Chief Justice, or, in his absence, by the presiding judge of said court.

EDWIN M. BORCHARD, LAW LIBRARIAN OF CONGRESS.

PENOLOGY.

The Illinois State Prison Commission and Its Plans.—The Illinois State Prison Commission was created three years ago by appointment of Governor Deneen. To one of the members of this commission, Mr. James A. Patten of Evanston, we are indebted for the facts contained in this note. As a member of the commission and in many other ways he has in the past and is yet devoting his time, energy, means, and rare good judgment to the public welfare. It was largely through his personal effort that the commissioners have been able to prepare the way for what will one day be, from every view-point, the most notable prison in the civilized world. All this preparation, be it said to the credit of the commissioners, has been accomplished in the face of obstacles of a political nature which only intelligent men of affairs can circumvent.

For many years various industrial establishments have been encroaching upon the walls of the state penitentiary at Joliet. Several unfavorable consequences from the point of view of the penitentiary interests have followed upon this condition. The atmosphere has been vitiated by smoke and with foulness due to other sources.. On this account alone the location has become highly undesirable as a place for the state prison. Sanitary conditions cannot be maintained and consequently, we believe, the effectiveness of the institution as a place of penal confinement is to some extent minimized. Surrounded as the prison is with property that has been acquired for industrial uses, the site itself has become immensely valuable from the commercial point of view. This fact bears upon the problem of economic administration. It is impossible as long as the prison is in its present situation to work out any scheme of outdoor farm labor which experience elsewhere has proven to be a most salutary form of labor from the points of view of practical education, reform, and health.

Finally, located as it is, the difficulty of expansion has become a matter of serious consideration. Whatever may be the dreams of criminologists, and social reformers in general, we are not yet at the stage at which we can sanely neglect the practicability of prison expansion in choosing our sites and in erecting our buildings.

These are the considerations that led the Governor to appoint a special commission with instructions to choose a site, purchase a tract of land, and develop plans for buildings. It was the purpose of this commission, Mr. Patten tells us, to find land adequate to the needs of the new prison within a short distance of the city of Joliet in order that, when the time for building should arrive, convict labor might be employed if it should be found practicable. It was desired, also, to secure land on which sand, gravel, and stone could be found in considerable quantities, and furthermore land which would be suitable for tilling purposes. The commission was fortunate in securing at reasonable